BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES E. HARRIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,034
WAL-MART	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
and INSURANCE COMPANY OF THE STATE	)	
OF PENNSYLVANIA	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carriers (respondent) appealed the March 8, 2011, Award entered by Special Administrative Law Judge (SALJ) Jerry Shelor. The Workers Compensation Board heard oral argument on July 6, 2011.[1]

APPEARANCES

Michael R. Lawless of Lenexa, Kansas, appeared for claimant. Ryan D. Welttz, of Overland Park, Kansas, appeared for respondent and its insurance carriers (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a series of accidents from March 31, 2008, through July 25, 2009. In the March 8, 2011, Award, SALJ Shelor determined (1) claimant's date of accident is July 25, 2009; (2) claimant's condition arose out of and in the course of his employment while working for respondent; (3) respondent had notice and actual knowledge of claimant's accident in April 2009; (4) by implication found that claimant made a timely

[1] E. L. Lee Kinch, of Wichita, Kansas was appointed as a Pro Tem in this matter.

written claim; (5) claimant has a 10% whole body functional impairment; and (6) claimant is entitled to a 64.7% work disability[2] (based upon a 100% wage loss and a 29.4% task loss). SALJ Shelor awarded claimant disability benefits for a 64.7% work disability, and ordered that any unauthorized medical benefits should be reimbursed to claimant up to $500 less any previously reimbursed unauthorized medical benefits paid to claimant.

Respondent contends claimant has failed to sustain his burden of proving that he suffered personal injury by accident arising out of and in the course of his employment. Respondent also maintains claimant failed to provide timely notice of his alleged accidental injury. Respondent argues claimant should not receive work disability benefits. In its brief, respondent states:

> The provisions of K.S.A. 44-501(c) provide the statutory requirement of a nexus between the wage loss and the injury. Respondent respectfully requests the Board determine that in this instance claimant's wage loss is not a product of his accidental injury and that work disability benefits as a consequence are not recoverable. After all, had claimant not been terminated for absenteeism, he would be earning comparable wages now.[3]

Finally, respondent contends reimbursement for medical expenses claimant incurred should be limited to $500. At oral argument before the Board, respondent stipulated that claimant made a timely written claim.

Claimant contends he has proven he suffered personal injury by accident arising out of and in the course of his employment, and that he provided timely notice of his accidental injury. Claimant argues he is entitled to receive work disability benefits and asks the Board to affirm the Award with respect to work disability. Claimant asserts reimbursement for medical expenses should not be limited to $500 and requests the Board order respondent and its insurance carrier to pay for the medical bills incurred by claimant for his treatment.

The issues before the Board on this appeal are:

1. Did claimant suffer a personal injury by accident arising out of and in the course of his employment?;

2. If so, did claimant give timely notice of the accident?;

3. What is the nature and extent of claimant's disability?; and

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[2] A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[3] Respondent's Brief at 13-14 (filed Mar. 29, 2011).

4. Should claimant's reimbursement of medical expenses be limited to $500.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant worked for respondent in its store located at K-7 and Santa Fe in Olathe, Kansas (K-7 store) from March 31, 2008 through July 25, 2009. While working at the K-7 store, claimant's position was in night maintenance. Before working at the K-7 store, claimant worked eleven months in daytime maintenance at another of respondent's stores. While working in night maintenance, claimant would sweep the floors, the aisles and underneath both sides of the aisles using a 17-inch broom. Claimant also mopped floors once a week. This process took three hours and required claimant to bend over to put pressure on the mop. Claimant also used a walk-behind power scrubber to clean the floors in the area where the cash registers are located.

Claimant was also required to clean the restrooms on a rotating basis, and to clean the store glass on the doors and meat counter. Twice a year claimant would wax the simulated wood floors. He would also spend one hour each night stocking shelves, which required lifting 50 pound boxes of paper. Claimant testified the boxes would sometimes have to be lifted onto a shelf that was shoulder height or slightly higher. The heaviest items lifted were boxes of bags that weighed 65 pounds. Because of the nature of his job, claimant was required to kneel, bend, stoop and squat. Claimant used a pedometer one week, and determined that while working, he walked 12-17 miles every shift.

In April 2009, claimant testified he experienced pain across his lower back and down his left leg. He told people he was working without pain. Because claimant began having pain in his left leg, on April 24, 2009, he went to see his family physician, Dr. Michael Greenfield. Dr. Greenfield had claimant undergo an MRI, which revealed a bulging disc. Dr. Greenfield referred claimant to Dr. Michael Spradlin who recommended a series of epidural shots, but claimant declined this treatment. Dr. Greenfield wrote a prescription for claimant to have more rest periods at work.[4]

The day after claimant saw Dr. Spradlin, claimant testified he told his store manager, Mr. Miller about his back problems. Mr. Miller allegedly told claimant to talk to his supervisors. Claimant told his supervisors about his back problems, showed them the prescription for more rest periods, and was told that he could not be given extra rest periods. Claimant testified his managers threw the prescription in the trash. Claimant indicated he never requested medical treatment and was not given an accident worksheet to complete. He continued working at his regular job, with back and leg pain, until he was

[4] Cont. R.H. Trans. (Oct. 11, 2010) at 28.

discharged for absenteeism on July 25, 2009. Claimant's medical treatment for his back and leg pain consists of taking Tramadol, which was prescribed by Dr. Greenfield.

At the request of his attorney, claimant saw Dr. Edward Prostic, an orthopedic specialist on January 4, 2010. Dr. Prostic reviewed the MRI and medical reports of Drs. Greenfield and Spradlin, took a medical history from claimant, and physically examined claimant. The MRI revealed a relatively shallow bulging disc extending into his left lateral recess and entrance zone of the ipsilateral nerve root foramen at L5-S1 with moderately severe narrowing of the nerve root foramen.[5] Claimant reported to Dr. Prostic that prior to his accident, he had no impairment from his low back. Dr. Prostic also ordered an x-ray of claimant's low back, which revealed degenerative disk disease at L5-S1.

Dr. Prostic opined claimant sustained repetitious minor trauma to his low back during the course of his employment March 31, 2008 through July 25, 2009. He testified that the repetitious minor trauma included mopping floors, stocking supplies and repairing objects. Dr. Prostic opined claimant aggravated the preexisting degenerative disc disease in his low back[6], and indicated the MRI of claimant's lumbar spine confirms that he had wear and tear changes in his low back. Claimant gave Dr. Prostic no medical history of any previous significant back problems, but did give a history of depression. Dr. Prostic recommended claimant use intermittent heat or ice, massage, therapeutic exercises and that claimant take analgesic medicine as needed.

Using the range of motion model, Dr. Prostic opined that as a result of the back injury, claimant has a 10% permanent functional impairment to the body as a whole. He indicated the rating was pursuant to AMA *Guides.*[7] Dr. Prostic indicated he used the range of motion model because claimant has a repetitive injury rather than a single-injury event.[8] However, on cross-examination, Dr. Prostic indicated using the range of motion model was not provided for in the *Guides,* but in subsequent writings of the American Medical Association on how to use the *Guides*.[9] He later testified that a paragraph at page 99 of the *Guides* allows a physician to use the range of model motion to determine a claimant's permanent impairment.

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[5] Prostic Depo. at Ex. 2.

[6] *Id.* at 5-6.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (*4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[8] Prostic Depo. at 14-15.

[9] *Id.* at 40.

Dr. Prostic testified that in the case of aggravation of degenerative disc disease, the impairment is caused by additional annular tears, making the disc less stable and additional overloading of the posterior facets, allowing them to become more painful, or stretching of the posterior facets, allowing pseudosubluxation. Dr. Prostic indicated that generally something occurs that allows a motion segment to become less stable than it was previously.

Dr. Prostic indicated that he restricted claimant from lifting more than 30 pounds occasionally from knee to shoulders. He opined claimant can no longer perform 5 of 17 job tasks identified by Michael Dreiling, a vocational expert, for a 29.5% task loss. Dr. Prostic indicated patients with depression often feel symptoms to a greater extent than those who do not suffer from depression. He testified that if a range of motion model is used, depression leads to more loss of motion than may exist in a person who is not depressed.[10] At the time Dr. Prostic saw claimant, he was not being treated with antidepressant medication.

At respondent's request, claimant was seen by Dr. David Ebelke, an orthopedic physician, on May 17, 2010. Dr. Ebelke, who treats only backs, reviewed the MRI, the medical records of Drs. Greenfield and Spradlin, the report of Dr. Prostic, took a history from claimant and physically examined claimant. Dr. Ebelke stated the MRI showed moderate loss of a disc height/degenerative disc at L5-S1, with a small bulge at L5-S1. The MRI also showed early signal loss at L3-4 and L4-5.

Dr. Ebelke opined that nothing on the MRI was attributable to claimant's work activities, and that claimant's back condition was not caused or aggravated by his work. He opined that although claimant would fit into DRE Lumbosacral Category II, his impairment preexisted his employment with respondent. Dr. Ebelke found it unusual that ten months after claimant was no longer working, claimant indicated his symptoms were worsening. He determined there was no need for treatment or restrictions, and specifically indicated a person with claimant's pathology could lift much more than 30 pounds on a regular basis.

The following testimony of Dr. Ebelke is significant:

> Q. What is your position or opinion regarding the possibility of having a, quote, repetitive use syndrome, end quote with regard to the spine?
>
> A. No. 1, there is no such thing. There's no evidence of such thing, no medical or scientific basis for such a thing in the spine. It's something that either doctors or

[10] *Id.* at 26.

> attorneys have come up with. But it's not scientific. It borders on ludicrous. It doesn't make any sense.[11]

At the request of claimant's counsel, claimant was interviewed by Michael Dreiling, a vocational expert, on July 13, 2010. Mr. Dreiling took claimant's job history, educational history and the prepared a list of 17 distinct and non-duplicative tasks and the physical requirements for jobs claimant performed in the fifteen years before his injury.[12] At the time claimant was interviewed, he was unemployed, but was actively seeking employment.[13] Mr. Dreiling indicated that claimant has a 100% wage loss.[14]

PRINCIPLES OF LAW AND ANALYSIS

1. Did claimant suffer a personal injury by accident arising out of and in the course of his employment?

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[15] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[16] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[17]

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[11] Ebelke Depo. at 14-15.

[12] Dreiling Depo. at 7-8.

[13] *Id.* at 8-9.

[14] *Id.* at 9.

[15] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[16] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[17] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

Claimant alleges that he suffered a repetitive injury to his low back caused by the tasks he performed while employed by respondent. Specifically, claimant testified he walked 12-17 miles each shift, and that his job duties required repeated lifting, bending, stooping and squatting. Claimant testified his job activities caused his back to become symptomatic. Claimant relies on the opinion of Dr. Prostic that his work activities aggravated the degenerative disc disease in his low back.

Respondent argues that claimant has failed to produce any credible evidence that he suffered any injury above and beyond what was caused by the natural aging process. Respondent asserts claimant has failed to prove his degenerative condition would not have worsened had he not worked and that it was, in essence, coincidence that claimant's back worsened while at work. Respondent relies on the expertise of Dr. Ebelke, who indicated claimant's condition is age related, not work-related.

The SALJ found Dr. Prostic's opinion on causation more credible than that of Dr. Ebelke, by finding claimant suffered an injury by accident that arose out of and in the course of his employment. Dr. Ebelke's opinion on causation is suspect. The Kansas Legislature passed legislation, establishing that a worker can suffer an injury through repetitive microtraumas. Dr. Ebelke testified that repetitive use cannot cause injury to the low back or spine. This is contrary to legislation and case law. It would also require a worker to suffer a single traumatic injury to his or her low back in order to have a compensable injury. The Board finds that the expert medical opinion testimony of Dr. Prostic to be credible and finds that claimant has met his burden of proof that he was injured by accident arising out of and in the course of his employment. Prior to claimant working for respondent, his back was asymptomatic. Claimant's job was very physical and many of the tasks that claimant performed were repetitious. The Board affirms the ALJ on this issue, and finds claimant suffered a work related repetitive injury to his back.

2. Did claimant give timely notice of the accident?

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as

> provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The SALJ determined claimant's date of accident was July 25, 2009, the last day he worked. The SALJ then determined that claimant gave timely notice of the accident and respondent had actual notice of the accident in April 2009, when claimant told his supervisor of his low back problems and requested accommodations. The Board finds that claimant gave timely notice, but modifies the SALJ's finding as to the date of accident and the date notice was given.

K.S.A. 2009 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

Paraphrasing the above statute, the date of accident for a series is the earliest of (1) the date the authorized physician took claimant off work or issues work restrictions, (2) the date claimant gave respondent written notice of injury, or (3) the date claimant is informed in writing that his condition is work-related. In this case, none of these three events occurred before August 18, 2009, the date claimant filed his Application for Hearing.

The restrictions given to claimant were from Dr. Greenfield, who was not an authorized treating physician. And there is no evidence in the record that a physician communicated to claimant, in writing, that his injury was work-related. Therefore, the Board finds that claimant's date of accident is August 18, 2009, and notice was timely.

3. What is the nature and extent of claimant's disability?

K.S.A. 44-510e(e) states:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

> covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2009 Supp. 44-501(c) states:

> (c) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The SALJ determined the evaluation of Dr. Prostic is more credible than that of Dr. Ebelke. Accordingly, the SALJ adopted the 10% permanent impairment given by Dr. Prostic. This Board concurs. Dr. Prostic indicated he used the range of motion model, rather than the DRE model, because claimant suffered a series of repetitive microtraumas. Dr. Ebelke placed claimant in DRE Lumbosacral Category II, which is a 5% impairment but determined claimant's back injury was not work-related. The greater weight of the evidence suggests that claimant has a 10% permanent impairment to the lower back, as opined by Dr. Prostic.

Claimant asserts that he is entitled to work disability benefits. He was terminated by respondent on July 25, 2009, when the accommodations recommended by Dr. Greenfield could not be granted. Dr. Prostic restricted claimant from lifting more than 30 pounds and opined that claimant can no longer perform 5 of 17 job tasks, for a 29.4% task loss. Dr. Ebelke indicated claimant has no restrictions as a result of his work-related incident. However, he did indicate that it is reasonable for claimant to restrict his activities for pain control.

Respondent argues claimant's task loss was not a result of any work-related injury. The greater weight of the evidence indicates claimant suffered a task loss as a result of his

injury. Dr. Prostic's restrictions appear to be reasonable and necessary. Only Dr. Prostic provided meaningful testimony as to claimant's task loss. Claimant testified he is no longer working and Michael Dreiling opined claimant has a 100% wage loss.

Respondent alleges claimant was discharged for cause, therefore, claimant's work loss was not caused by his injury. Respondent argues the Board should follow *Bergstrom*[18] to find that a literal reading of the statutes concludes that no work disability benefits are owed claimant, because it was claimant's absenteeism, not his injury that caused his wage loss. Claimant asserts he had to do his job with respondent or be discharged, and that, in essence, his absenteeism was caused by his inability to physically perform his job. Claimant alleges respondent had other jobs he could perform, but he was told they were not available.[19]

Respondent is correct that *Bergstrom* requires a literal reading of K.S.A. 44-510e(a). That statute provides that a claimant is limited to an award based on a permanent functional impairment, if his or her post-injury wages equal 90% or more of their pre-injury wages. When a greater wage loss occurs, a claimant is entitled to a permanent partial general disability in excess of the functional impairment. Claimant's wage loss is the difference between a claimant's pre-injury wages and his or her post-injury wages. K.S.A. 44-510e(a) does not make an exception to applying this formula where a claimant is discharged for cause.

In the recent case of *Butler,*[20] this very issue was addressed by the Kansas Court of Appeals. Butler was discharged for cause, for failing to disclose on a health history form that he had a prior work-related injury. Cessna argued claimant's work loss was not caused by his injury, but rather by his misconduct. The court indicated *Bergstrom,* requires a literal interpretation of K.S.A. 44-510e(a). Consequently, the reason a claimant is terminated is irrelevant in determining wage loss.

Respondent next argues that a literal reading of K.S.A. 2009 Supp. 44-501(c) requires that claimant's increased disability must be caused by the aggravation of his preexisting condition. Respondent again asserts it is claimant's absenteeism that caused his work disability, not his injury and that K.S.A. 44-2009 Supp. 44-501(c), if read literally, precludes claimant from receiving work disability benefits. In the present claim, respondent presented scant evidence to show that claimant had an impairment before his injury.

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[18] *Bergstrom v. Spears Manufacturing Co.,* 289 Kan. 605, 214 P.2d 676 (2009).

[19] Cont. R.H. Trans. (Oct. 11, 2010) at 31-33.

[20] *Butler v Cessna Aircraft Co.,* No. 103,965, 2011 WL 2205238, 252 P.3d 647 (2011). Unpublished Court of Appeals opinion filed June 3, 2011.

In *Tyler,*[21] the Kansas Court of Appeals held that the calculation of permanent partial disability is governed by K.S.A. 44-510e. In *Tyler,* claimant argued he suffered a work disability, because his wages decreased as a result of a loss of the way workers were offered overtime. The court held that a claimant's right to work disability does not require a causal connection between the injury and wage loss. Accordingly, K.S.A. 44-510e, not K.S.A. 2009 Supp. 44-501(c), must be used to determine claimant's permanent partial disability.

The Board finds that claimant has met his burden of proof that he is entitled to work disability benefits. Accordingly, claimant has a 29.4% task loss and a 100% wage loss which results in a 64.7% work disability.

4. Whether claimant's reimbursement of medical expenses should be limited to $500.00.

Respondent asserts claimant should be limited to $500.00 for unauthorized medical expenses, because claimant sought medical treatment from his personal medical provider. Claimant contends he was unaware that he needed to obtain permission from his employer to see a physician or obtain a court order. It is well known that under the Kansas Workers Compensation Act (Act), a respondent has both the responsibility and the right to provide medical treatment.[22]

Respondent has not argued that the treatment received by claimant was, in any way, excessive or inappropriate, but merely that the treatment was not necessitated by a work injury and that claimant failed to obtain authorization from respondent for the treatment. Claimant's medical treatment was both reasonable and necessary. Therefore, the Board finds respondent is liable to pay all claimant's reasonable and necessary medical treatment in accordance with the schedules. The Award, granting claimant medical treatment, without limiting him to the $500.00 in unauthorized medical treatment, is affirmed.

CONCLUSION

1. Claimant suffered a back injury by accident that arose out of and in the course of his employment.

2. Claimant's date of accident pursuant to K.S.A 2009 Supp. 44-508(d) is August 18, 2009, and claimant gave timely notice to respondent by filing an Application for Hearing on the same date.

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[21] *Tyler v Goodyear Tire and Rubber Co.,* 43 Kan App. 2d 386, 224 P.3d 1197 (2010).

[22] K.S.A. 2009 Supp. 44-510h.

3. Claimant provided a timely written claim.

4. Claimant, as a result of his back injury, suffered a 10% permanent functional impairment to the body as a whole.

5. Claimant suffered a work disability of 64.7% (29.4% task loss plus a 100% wage loss).

6. Respondent is ordered to pay claimant's reasonable and necessary medical treatment in accordance with the fee schedules.

AWARD

WHEREFORE, the Board modifies the March 8, 2011, Award entered by SALJ Jerry Shelor, by finding claimant suffered personal injury by accident on August 18, 2009, and that claimant gave notice to respondent on the same date. All other findings and conclusions contained within the SALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant
Ryan D. Weltz, Attorney for Respondent and its Insurance Carriers
Jerry Shelor, Special Administrative Law Judge
Marcia L. Yates Roberts, Administrative Law Judge